Florida approved a settlement determining the amount of the tax liabilities that Fred Stanton Smith, as trustee of the Miami Center Liquidating Trust, was required to pay for the tax years 1985 through 1992[5]. *See*, *In re Holywell Corp.*, 177 B.R. 991, 999 (S.D. Fla. 1995) (The trustee "paid the taxes in his capacity as Trustee").[6] The Settlement provided that "the United States is . . . permitted [to] take whatever administrative action is appropriate to account for the payment to be made." [7]

2. On April 16, 1992, the Commissioner credited the trustee's payment of estimated ordinary income taxes for the year ended December 31, 1991, in the amount of $2,920,000, to the account of "Fred Stanton Smith, Bankruptcy Trustee, Miami Center Liquidating Trust," [8] for taxes due on income, in the amount of $8,556,230, attributable to the Petitioner's partnership interests in the Miami Center Joint Venture, instead of the Petitioner's account. IRS Transcript, February 7, 1995.

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[5] The Petitioner was informed in May 1995 that the U.S. Justice Department's Tax Division had relieved the trustee of his statutory duty of filing tax returns as a fiduciary for the Miami Center Liquidating Trust for the tax years 1985 through 1992. Compare, 503 U.S. at 54 (The trustee must file a return as a fiduciary of a trust of an individual, in accordance with 26 U.S.C § 6012(b)(4), and pay the tax due on the income attributable to the Petitioner's property, *Id.* at 52); also, *supra* n. 2.

[6] The court held that the trustee's payment of estimated taxes was in conformity with this Court's opinion and "consistent with the confirmed plan which provided that 'all costs, expenses and obligations incurred by the Trustee in administering the Trust . . . shall be a charge against the Trust Property." *Id.*

[7] *See*, Rev. Rul. 72-436, 1972 C.B. 643 ("The payment made by the transferee is to that extent a payment of the transferor's tax liability, and the amount of such payment will be credited against any outstanding tax due from the transferor"); also, 26 CFR § 301.6901-1 ("The acceptance of an offer in compromise from [a] transferee does not compromise the liabilities of the transferor . . . the amount paid is credited against the transferor's tax").

[8] Compare, 503 U.S. at 56 ("The trustee . . . is not acting as the fiduciary of Gould's bankruptcy estate.")

3. On November 10, 1993, in reliance on 26 U.S.C. § 1399[9], instead of crediting the trustee's payment of taxes to the Petitioner's account, the Commissioner credited the trustee's payment of $10,824,123.11 to Holywell Corporation's account, of which $10,171, 334.15 was credited to Holywell's account for the fiscal year ended July 31, 1986,[10] as taxes due for proposed capital gains attributable to the trustee's sale of the Miami Center, and the remainder was attributable to the Miami Center Liquidating Trust's interest income[11] in the tax years 1987 through 1992. IRS *Transcript*, July 6, 1995.

4. On October 10, 2000, respondent Commissioner issued a notice of intent to levy under 26 U.S.C. § 6331, to collect self-employment taxes of $5,478, plus penalties and accrued interest, for the tax year ended December 31, 1997.

5. On October 18, 2000, the petitioners filed a timely request for a due process hearing ("CDP hearing") under 26 U.S.C. § 6330(a)(3)(B).

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[9] 26 U.S.C. § 1399 provides that "[e]xcept in any case to which section 1398 applies, no separate taxable entity shall result from the commencement of a case under title 11 of the United States Code."

[10] Compare, *Miami Center Limited Partnership v. Bank of New York*, 838 F. 2d 1547, 1553 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988) (After the assignment to the trustee of Holywell's cash and property, the liquidating trustee sold the Miami Center on October 10, 1985, in accordance with the provisions of the confirmed "plan of liquidation"; *see also*, 503 U.S. at 53 ("The plan . . . transferred the corporate debtors' estates to . . . Smith, as trustee of the Miami Center Liquidating Trust"), and quoting the *Brief for the United States*, citing Webster's Third New International Dictionary 132 (1986), this Court defined an assignee as "one to whom a right or property is legally transferred"; also, a valid assignment is a taxable event, *Blair v. Commissioner*, 300 U.S. 5, 12(1932); and 503 U.S. at 52 (The trustee must pay taxes as the "assignee" of Holywell's property). After the assignment of Holywell's cash and property to the Miami Center Liquidating Trust on October 10, 1985, Holywell had no assets and no taxable income.

[11] The Commissioner's transcripts credited the interest income of the Miami Center Liquidating Trust to the account of Holywell's bankruptcy estate. Compare, 503 U.S. at 58-59

6. On May 29, 2001, the Commissioner issued income examination changes to Fred Stanton Smith, as trustee of the Miami Center Liquidating Trust, acting as a fiduciary of the Petitioner's estate. The Commissioner assessed ordinary income taxes of $22,871,041 as the trustee's distributable share of the Miami Center Joint Venture's partnership income[12], and assessed a penalty against the trustee for failure to comply with the Accuracy Statute, 26 U.S.C. § 6662, for the tax year ended December 31, 1997.

7. During a CDP hearing on December 5, 2001, the Petitioner challenged the appropriateness of the Commissioner's collection actions, in accordance with 26 U.S.C. § 6330(c)(A)(2), on the following grounds:

(a) This Court's *Holywell* opinion was binding with respect to the tax controversy at issue, and thus, the trustee's liability for the payment of taxes due, and accrued interest, on the income attributable to the property, of which the Petitioner was the beneficial owner, 503 U.S. at 56, had to be credited to the Petitioner's account at the time the taxes were due, *Id.* at 58, and the Petitioner's self-employment taxes incurred for the tax year ended December 31, 1997 offset against the credit balance of his account.

(b) Pursuant to the regulations concerning liquidating trusts, 26 CFR § 1.671-2T (applicable prior to 1999) and Rev. Proc. 82-58, 1982-2 C.B. 847, the Miami Center Liquidating Trust was a "pass-through" entity, and 26 U.S.C. § 1398(i) provides that upon termination of the estate, created upon the

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[12] The Miami Center Joint Venture ("MCJV") was a general partnership, of which the Petitioner was a general partner. Legal title of the Petitioner's partnership interests was transferred to the trustee of the Miami Center Liquidating Trust, *see* 503 U.S. at 56 quoting 26 CFR § 301.7701-6 ("A fiduciary is a person who holds in trust an estate to which another has beneficial title . . . and controls income of another.").

commencement of a proceeding under title 11, the "debtor succeeds to the tax attributes of the estate", App. 10.[13]

8. On February 1, 2002, the Commissioner issued a notice of determination, rejecting the Petitioner's claims, which notice held in direct conflict with this Court's *Holywell* opinion:

> You have stated that . . . the Miami Center Liquidating Trust was a liquidating trust for purposes of Treasury Regulation Section 301.7701-4(d),[14] and that you were the . . . beneficiary of that trust who was entitled to the $13,300,000[15] paid by the Trustee to the Internal Revenue Service, a creditor of the debtors.[16]
>
> Miami Center Liquidating Trust was set up for the purpose of liquidating certain property and distributing the

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[13] *See* 26 U.S.C. § 1398(i), App. 10 (The tax attributes include net operating losses and capital losses)

[14] *See* 503 U.S. at 56, quoting 26 CFR § 301.7701-4(d) (The Miami Center Liquidating Trust fit the description of a liquidating trust, which was created "for the express purpose of liquidating Gould's estate and distributing it to creditors." *Id.*)

[15] Previously on October 17, 2001, the IRS Appeals Officer Barbara Petrohovich stated that "[i]n reviewing the tax account of the Miami Center Liquidating Trust (of which you are the beneficiary), the tax as a result of the IRS audit has now been assessed. You are claiming that the $22,871,041 in corrected tax should flow to you as a tax payment on your personal tax returns." The total amount of taxes that the Commissioner was required to credit to the Petitioner's account exceeded $44 million, not including accrued interest, through the tax year ended December 31, 1998.

[16] This conclusion is in direct conflict with this Court's *Holywell* opinion. *See*, 503 U.S. at 58-59. This Court held that "[t]he United States is not seeking from the trustee any taxes that became due prior to his appointment," and also held that the United States was a creditor with a "post-confirmation" claim for the payment of taxes against the Miami Center Liquidating Trust. This Court explained that section 101(10) of the Bankruptcy Code "define[d] a 'creditor' as used in § 1141(a) as an entity with various kinds of pre-confirmation claims." Thus, the Internal Revenue Service was *not* a creditor of the bankruptcy estates of the debtors for the payment of income taxes, because "the debtors were discharged under Code § 1141" on August 8, 1985, *Miami Center*, 838 F. 2d at 1552, and no tax liability became due until April 15, 1986. *See* 503 U.S. at 58.

property to creditors of the debtors. The creditors were the beneficiaries of the trust[17]. If it was a liquidating trust for purposes of applicable regulations, the beneficiaries/creditors must have been treated as the grantors and deemed owners of the trust[18] . . . . The distributions were made to a creditor, the Internal Revenue Service.

9. On March 1, 2002, the petitioners filed a timely petition in the tax court for a redetermination of deficiency, and alleged that the Commissioner's Determination was arbitrary, capricious, and contrary to this Court's *Holywell* opinion, and the applicable regulations and rulings concerning liquidating trusts.[19]

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[17] This conclusion is also in direct conflict with this Court's *Holywell* opinion. *See*, 503 U.S. at 54 ("the trustee must file a return because he is the fiduciary of a trust of an individual"). This Court did not conclude that the trustee was the fiduciary of a creditors' trust; *see*, *Id*. at 52 ("the trustee must pay the tax due on the income attributable to the individual debtor's property"). *See also*, *Commissioner v. Sunnen*, 333 U.S. 591, 604-605 (1948) (Income is taxable to the beneficial owner of the property at the time the income is earned); *also Blair* 300 U.S. at 12 ("The one who is to receive the income as the owner of the beneficial interest is to pay the tax"). After the establishment of the Miami Center Liquidating Trust on October 10, 1985, the trustee received the Petitioner's interest income distributive share of the Miami Center Joint Venture's ordinary income, and the dividend distribution of Holywell's cash and property, *see* 503 U.S at 56 ("A fiduciary is a person who holds in trust an estate to which another has the beneficial title or in which another has a beneficial interest, or receives and controls income of another . . . .")

[18] Compare, Rev. Rul. 72-137, 1972-1 C.B. 1 (In accordance with 26 CFR § 1.337-2, when a liquidating corporation transfers cash and real property to an independent trustee, the corporation's "shareholders are considered the 'owners' of the trust and are taxable on the income therefrom"); also, Rev. Rul. 80-150, 1980-1 C.B. 316 (the shareholders of a liquidated corporation will be considered the owners of a liquidating trust, created in accordance with 26 CFR § 301.7701-4(d), to dispose of the corporation's assets, and the shareholders would be taxable on the income from the trustee's sale of property)

[19] After this Court's *Holywell* opinion was issued, the Commissioner, and his lawyers, refused to meet with the Petitioner, and counsel, to discuss the tax consequences of this Court's opinion, on the grounds that "the public policy questions were before the Tax Court."

10. On October 24, 2002, the Commissioner filed a motion to stay the civil action in the tax court on the grounds that the Criminal Investigation Division ("CID") had commenced "an administrative criminal investigation against the petitioner for 1997 and other years,"[20] and represented:

> The facts, circumstances, and transactions at issue in the criminal investigation are identical to those present in the instant proceeding. All testimony, documents, and evidence in this civil proceeding are directly related to the matters pending in the criminal matter and bear directly upon whether petitioner has committed the federal tax crimes under investigation.

During a hearing held on December 2, 2002, the Commissioner's attorney alleged that "[t]he criminal matter that is being investigated is directly transactionally related to the very issue in this case. It is exactly the same issue. The petitioner has been advised[21] that he is being investigated for filing false claims against the United States."

11. After the tax court entered an Order on June 5, 2003, at the Petitioner's request, lifting the stay of the proceeding previously granted to the Commissioner, the Petitioner filed requests for admissions and interrogatories[22] for the purpose of establishing that there was no genuine dispute concerning the following material facts showing fraud against the Petitioner's rights as a taxpayer:

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[20] The criminal investigation was commenced less than 45 days after the Petitioner's lawyers provided the Commissioner's attorney with a first draft of the Petitioner's requests for admissions.

[21] On October 21, 2002, CID Special Agent William A. Martin informed the Petitioner that a criminal investigation had been commenced, of which the Petitioner was the subject, and refused to specify the allegations upon which the recommendation to commence the investigation was based.

[22] The Commissioner's answers to the requests for admissions were due on July 16, 2003, and the answers to the interrogatories were due on July 21, 2003.

(a) The Commissioner willfully ignored this Court's opinion, rejecting the argument of the United States that "[a]t confirmation . . . the bankruptcy plan substituted the trustee for Gould but did not alter the bankruptcy estate . . . [and the trustee] took Gould's place as the fiduciary of 'an estate of an individual under chapter . . . 11," 503 U.S. at 56.

(b) Contrary to this Court's *Holywell* opinion, the Commissioner treated the trustee as the fiduciary of the Petitioner's bankruptcy estate and the Miami Center Liquidating Trust as a bankruptcy estate for tax purposes, instead of a "new" entity, that was a separate liquidating trust, distinct from the bankruptcy estate. *See* 503 U.S. at 56.

(c) The Commissioner ignored this Court's conclusion that "the trustee must pay the tax due on the income attributable to the individual debtor's property," 503 U.S. at 52, failed to credit the taxes, and accrued interest, which the trustee was required to pay to the Petitioner's account from the time such taxes were due. Instead, contrary to 26 U.S.C. § 1398(f), App. 9, the Commissioner treated the transfer of the property of the Petitioner's individual bankruptcy estate to the Miami Center Liquidating Trust as a taxable event,[23] and the creation of the

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[23] The Commissioner's Report on The Bankruptcy Estate of Theodore B. Gould, issued on December 16, 1992, concluded that "[a] taxable event did take place on October 10, 1985 when the Bankruptcy Estate of Theodore Gould transferred its assets to the Miami Center Liquidating Trust in exchange for the discharge of indebtedness," representing a gain of $38,800,228, and treated $9,199,478 of the Petitioner's pre-petition loans to MCLP, and Holywell's nondebtor subsidiaries engaged in business in Florida, as capital losses incurred by the individual bankruptcy estate, instead of the Petitioner's capital losses. In fact, under substantive consolidation infra n. 29, and the dividend distribution of Holywell's cash to the Miami Center Liquidating trust, the Petitioner's property was the source of funds for the trustee's payment of the claims of creditors against MCLP's estate, for which the Petitioner was liable as MCLP's general partner, the payments should have been allowable tax deductible expenses on the Petitioner's Form 1040, *U.S. Individual Income Tax Return*, in the tax year that the trustee made the payment.

Miami Center Liquidating Trust as an assignment for the benefit of creditors, *supra* (*see*, the Commissioner's Determination); *also*, Rev. Proc. 94-45.[24]

(d) The Commissioner ignored the fact that this Court agreed with the alternative argument of the United States that the trustee must pay the tax due on the income attributable to Holywell's assets "as the 'assignee' of the property of a corporation", 503 U.S. at 52, for the fiscal year ended July 31, 1985.

(e) The Commissioner ignored the fact that Holywell's liquidation upon the assignment of its property to the Miami Center Liquidating Trust, *Id.* at 53, was a taxable event on October 10, 1985 [25] for which Holywell did not incur a tax liability.[26]

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[24] After this Court's *Holywell* opinion was issued, the Commissioner issued Rev. Proc. 94-45 which, in conflict with this Court's opinion, treats the Miami Center Liquidating Trust as an assignment for the benefit of creditors and states:

> A transfer to a liquidating trust for the benefit of creditors must be treated for all purposes of the Code as a transfer to creditors . . . to the extent that the creditors are the beneficiaries of the trust. (ENDNOTE 1)
>
> 1/ The tax consequences associated with the creation of a bankruptcy liquidating trust were not addressed in *Holywell Corp. v. Smith*, 112 S.Ct. 1021 (1992) (trustee of liquidating trust must file and pay tax due with respect to income and gains on trust assets.)

[25] *See Commissioner v. Sunnen*, 333 U.S. at 604 ("The crucial question remains whether the assignor retains sufficient power and control over the assigned property or over receipt of the income to make it reasonable to treat him as the recipient of the income for tax purposes.") It is incontrovertible that Holywell's management did not have any "power or control" over the trustee's actions concerning the property assigned to the trustee after the transfer on October 10, 1985 and the trustee, as a fiduciary acting on the Petitioner's behalf, was the "recipient" of the income attributable to the property. *See* 503 U.S. at 56.

[26] *See General Utilities and Operating Co. v. Helvering*, 296 U.S. 200, 204 (1935) ("The declaration and payment of the dividend resulted in no taxable income"); also, 26 CFR § 1.337-2 (applicable prior to August 1, 1986).

(f) The Commissioner ignored the fact that this Court held the Miami Center Liquidating Trust was "created for the express purpose of liquidating Gould's estate," 503 U.S. at 56, and the Petitioner owned 100% of Holywell's capital stock.

(g) The Commissioner ignored the fact that title of the substantively consolidated estates was transferred to the trustee, 503 U.S. at 50, and the trustee sold the Miami Center for $256,237,016.95 on October 10, 1985, for which the total sale proceeds attributable to the Miami Center Limited Partnership ("MCLP")'s property was $208,333,823, representing a § 1231 gain of $44,045, 815[27] of which the trustee's share, acting as a fiduciary on the Petitioner's behalf, was $33,034,362.

(h) The Commissioner failed to allocate MCLP's net operating losses of $33,762,459 for the year ended December 31, 1985 to the trustee[28], acting on the Petitioner's behalf, in accordance with the requirements of 26 U.S.C. § 704(b), after the capital accounts of MCLP's limited partners had been brought to zero in the tax year ended December 31, 1984.

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[27] The Commissioner's Report on Holywell Corporation & Subsidiaries, issued on July 14, 1992, proposed that Holywell had taxable income of $46,515,755 for the fiscal year ended July 31, 1986 attributable to the trustee's sale of the Miami Center; $471,122 for the fiscal year ended July 31, 1987 attributable to the Miami Center Liquidating Trust's interest income; $726,386 for the fiscal year ended July 31, 1989 attributable to the Miami Center Liquidating Trust's interest income; and $2,383,863 for the fiscal year ended July 31, 1990 attributable to interest payable on certain loans made to MCLP (the Eleventh Circuit Court of Appeals held that the Miami Center Liquidating Trust owned the loans and the loans, including accrued interest, were not paid), and the Commissioner failed to treat the principal amount of these post-petition loans as worthless capital losses of $4,717,405.

[28] The Commissioner also failed to treat the Petitioner's pre-petition loans to MCLP, made through Holywell and its subsidiaries, in the amount of $6,290,661, as worthless capital losses, despite the fact that the loans were not repaid.

(i) The Commissioner treated the trustee's use of Holywell's cash, in the amount of $21,096,305.22, to pay the claims of creditors against MCLP's estate as a "misappropriation of funds", instead of a dividend distribution to the trustee under a "modified form of substantive consolidation", *In re Holywell Corp.*, 54 B.R. 41, 43 (Bkrtcy. S.D. Fla. 1985)[29], which the trustee used to pay unsecured claims of creditors for which the Petitioner was liable as MCLP's general partner[30] and failed to treat the dividend distribution to the trustee, as a fiduciary acting on the Petitioner's behalf as Holywell's sole stockholder, as taxable income attributable to the Petitioner's property, for which ordinary income taxes, in

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[29] The bankruptcy court's amended confirmation order, entered on January 29, 1986, reaffirmed its prior order approving substantive consolidation, because in accordance with State law "in due course, a creditor of MCLP could reach . . . (iii) Holywell's assets (net of liabilities) by levying upon Gould's ownership of 100% of the stock of Holywell." Also, S. Ct. *Reply Brief of United States* (Holywell was "left, under the Bank's plan, with nothing. That plan provided for the transfer of all of the corporate debtors' assets to the liquidating trust . . . . Management was left in charge of the shell; the trustee had the assets.")

[30] The Commissioner's Report on Holywell Corporation & Subsidiaries concluded that the Internal Revenue Service was not bound by the various judgments of the courts, holding that by virtue of substantive consolidation, and the creation of the Miami Center Liquidating Trust, the property of Holywell, and its subsidiaries, was dividended to the liquidating trustee. The IRS Holywell Report held that because there is no statutory authority under the Internal Revenue Code for the consolidation of a corporation and an individual taxpayer, the IRS was not bound by the judgments, and thus, the Commissioner disallowed as capital losses the trustee's conveyance to the Miami Center's buyer of property, without consideration, the net depreciated cost of which was $4,578,142. The Commissioner held, contrary to the district court's judgment that the Miami Center Liquidating Trust "owned" the property and the trustee had authority to convey it without consideration to the Miami Center's buyer, that "[t]he Trustee would have to compensate" Holywell's nondebtor subsidiaries for the funds MCLP owed.

the amount of $4,154,637, were payable for year ended December 31, 1985.

(j) The source of funds for the trustee's payment of federal income taxes, and accrued interest, in the amount of $13,361,721.79, was additional post-confirmation ordinary income of $21,307,230, attributable to the Petitioner's property.

(k) The Petitioner's net operating losses allowable under 26 U.S.C. § 172 and capital loss carryover determined under 26 U.S.C. § 1212 exceeded his taxable income attributable to the property transferred to the Miami Center Liquidating Trust, and other entities, for the tax years 1985 through 1997.

12. In response on July 8, 2003, the Commissioner filed motions to extend the time to answer the requests for admissions and interrogatories, which the tax court granted, and also filed various motions for entry of a decision that the "proposed collection activity is not sustained", because the Commissioner represented that "the need for the criminal investigation against petitioner Theodore Gould to proceed in due course without interruption or interference from this civil matter outweighs the need to proceed with the proposed collection action of levy".

13. On August 13, 2003, the Petitioner filed a motion for summary judgment, in accordance with Tax Court Rule 121, to resolve the controversy concerning the tax consequences of this Court's *Holywell* opinion, and the regulations and rulings concerning liquidating trusts as pass-through entities.

14. On September 26, 2003, the tax court denied the Petitioner's motion filed to compel discovery. The tax court's Order did not explain why the Commissioner should not be required to answer the Petitioner's requests for admissions and interrogatories in accordance with the applicable rules, *see* App. 11.

15. On June 25, 2004, during a hearing on the Petitioner's motion for a status conference, the Tax Court Judge stated "given

the government's concession [not to collect the tax] . . . it's not necessary for me to reach the issue of the underlying liability". Thereupon, the tax court issued its Decision as follows:

> ORDERED that petitioner's motion for summary judgment is denied as moot. It is further
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> ORDERED that respondent is relieved of any obligation to respond to petitioners' requests for admissions and interrogatories. It is further
>
> ORDERED that respondent's motion for entry of decision is granted in that it is further
>
> ORDERED AND DECIDED that respondent may not proceed with proposed collection action as set forth in the Notice of Determination . . . for petitioners' taxable year 1997. App. 6.

16. On August 9, 2004, the Petitioner filed a timely notice of appeal to the court of appeals which was limited to the tax court's Orders denying the Petitioner's motion for summary judgment as moot and relieving the Commissioner of the obligation to answer the Petitioner's requests for admissions and interrogatories.

The tax court's Order that the Commissioner could not collect the Petitioner's self-employment taxes assessed for the tax year ended December 31, 1997 was not appealed.

17. On February 1, 2005, the court of appeals dismissed the Petitioner's appeal, and citing this Court's opinion, *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 333-35 (1980), and the court's opinion, *HCA Health Services of Virginia v. Metropolitan Life Ins. Co.*, 957 F. 2d 120, 123 (4th Cir. 1992), held that:

> The Goulds argue that the tax court should have addressed their challenge to the liability determination. However, because the Goulds were not aggrieved by the tax court's order, they lack standing to appeal, App. 3.

18. On April 26, 2005, the court of appeals denied the Petitioner's petitions for rehearing and rehearing en banc, in which the Petitioner argued:

(a) The appeal was limited to the collateral issues raised by the tax court's Orders denying the Petitioner's motion for summary judgment as moot and the tax court's abuse of discretion in relieving the Commissioner of the obligation to answer the Petitioner's requests for admissions and interrogatories in accordance with the applicable rules.

(b) The court's judgment was based on the erroneous material fact that "Theodore B. Gould and Helen C. Gould appeal from the tax court's order that the IRS could not proceed with its proposed collection action with respect to the Goulds 1997 tax year liability," App. 6.

(c) The court's judgment misconstrued this Court's *Deposit Nat'l Guaranty Bank* opinion and the court's *HCA Health Services* opinion.

(d) The court sanctioned the tax court's failure to exercise its prescribed jurisdiction to determine whether there was a deficiency or not, contrary to *Moses H. Cone Memorial Hospital v. Mercury Const. Corp.*, 460 U.S. 1 (1983), citing *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 819 (1976) ("[o]nly the clearest of justifications warrant a dismissal"), and failed to resolve a controversy "capable of repetition, yet evading review", *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911) since the "evading review" exception applies if "the same complaining party [will] be subjected to the same action again," *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975); and

(e) The court's interpretation of the "Aggrieved Party" rule violates the Due Process Clause because the Petitioner's self-employment taxes represent a "property interest protected by the Fifth Amendment," *Mathews v. Eldbridge*, 424 U.S. 319, 333 (1976), which the Commissioner was required to credit to the trust funds from which social security benefits are paid.

19. On May 2, 2005, CID Special Agent Charles R. Pine wrote a letter to Robert M. Musselman, Esq., the Petitioner's attorney,[31] and stated that the CID had "under consideration a recommendation that criminal proceedings be instituted against Theodore B. Gould for six counts of filing false claims against the United States, in violation of 18 U.S.C. § 287, for the years 1999[32], 2000, 2001, and 2002[33]." Reference to the tax year ended December 31, 1997, for which the Commissioner sought a stay of the civil action, and entry of a decision that the IRS could not collect assessed self-employment taxes until the criminal investigation was completed, was omitted, App. 7.

REASONS FOR GRANTING THE WRIT

1. The judgment of the court of appeals is in conflict with this Court's *Deposit Nat'l Guaranty Bank* opinion, sanctions a violation of due process of law, and is also in conflict with the opinions of other courts of appeals and the court's own precedent, concerning the "Aggrieved Party" rule and the mootness doctrine applicable under the "case or controversy" requirement of Article III.

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[31] Professor Musselman died on November 9, 2004. Professor Musselman taught tax law and accounting for 23 years at the University of Virginia, had been the editor of Alexander's Handbook on Federal Taxation for 7 years, and after retiring from the University, his law practice specialized in trusts, taxes, and bankruptcy.

[32] After this Court entered its *Holywell* opinion, and the U.S. Justice Department's Tax Division relieved the trustee of his statutory duty as a fiduciary of filing tax returns for the tax years 1985 through 1992, *supra* n. 2, Professor Musselman prepared and filed amended tax returns for the Petitioner for 1985 through 1992, 1993 through 1998, and also prepared the Petitioner's tax return for 1999 in conformity with this Court's opinion and 26 U.S.C. § 6034A(c).

[33] The Petitioner's tax returns for 1999, 2000, 2001, and 2002 are derivative of the amended returns that Professor Musselman filed for the prior tax years.

(a) *Deposit Nat'l Guaranty Bank* explains the standard for the application of the rule of federal appellate practice that "[a] party who receives all that he has sought generally is not aggrieved by judgment affording the relief and cannot appeal from it," 445 U.S. at 333, subject to the following exception which is clearly applicable in this case:

> Although a case or controversy is mooted in the Art. III sense upon payment and satisfaction of a final, unappealable judgment . . . *a confession of judgment by defendants on less than all the issues [does not] moot an entire case; other issues in the case may be appealable* (emphasis added)[34] . . . .
>
> The ["Aggrieved Party"] rule . . . does not have its source in the jurisdictional limits of Art. III . . . [an] appeal may be permitted from an adverse ruling collateral to the judgment on the merits at the behest of the party who prevailed on the merits, *so long as the party retains a stake in the appeal satisfying the requirements of Art. III.* (Emphasis added.) *Id.*

Article III, Section 2 of the Constitution provides that "[t]he judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority . . . [and]to controversies to which the United States shall be a party. . . ." App. 8.

The foundation of the "capable of repetition, yet evading review" exception expressed in *Southern Pacific Terminal Co. v. ICC*, and this Court's opinions concerning the mootness doctrine applicable under Article III, is based on the intent of the framers concerning the distinction made between the words "cases" and "controversies" in Article III and the meaning of "due process of law" expressed in the Fifth Amendment of the Bill of Rights. App. 8.

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[34] *See Powell v. McCormack*, 395 U.S. 487, 496 (1969) ("Where one of several issues becomes moot, the remaining live issues supply the constitutional requirement of a case or controversy.")

(1) The Article III "case or controversy" distinction is based on the understanding of the framers that controversies to which the United States is a party refers to a dispute arising of a civil nature, Tucker's *Blackstone, vol. I, Appendix at 421.* The word "controversy" refers to a cause of action presented in a civil case, Hamilton, *The Federalist*, No. 80. "A case in law or equity consists of the right of one party, as well as the other . . . aris[ing] under the constitution, or a law . . . of the United States, whenever its correct decision depends on the construction of either." Story, *Commentaries on the Constitution*, Bk. III, § 858, quoting *Cohens v. Virginia*, 19 U.S. (6 Wheaton) 264, 379 (1821).

Since the "Aggrieved Party" rule is an appellate practice that does not have "its source in the jurisdictional limits of Article III", 445 U.S. at 333, the court of appeals should have used the rule with discretion, and only after review of the tax court's findings of facts and conclusions of law with respect to the question of whether the underlying tax controversy was a continuing controversy "capable of repetition" to avoid depriving the Petitioner of rights to the exercise of judicial power to resolve the controversy concerning the Commissioner's conduct with respect to the tax consequences of this Court's *Holywell* opinion.

The criteria for the determination of a taxpayer's standing and whether a controversy is moot are the same and although the Article III, Section 2 "case or controversy" requirement "limit[s] the business of the federal courts to questions presented in an adversary context," *Flast v. Cohen*, 392 U.S. 83, 95 (1968) (a taxpayer has standing for judicial review of a controversy concerning existing taxes and foreseeable liabilities), and the parties must have a "personal stake in the outcome of the controversy," *Baker v. Carr*, 369 U.S. 186, 204 (1962), a case is moot only if "[t]he controversy between the parties . . . clearly ceased to be 'definite and concrete' and no longer 'touch[s] the legal relations of parties having adverse legal interests,'" *DeFunis v. Odegaard*, 416 U.S. 312,

317 (1973), this Court has held that mootness "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented . . . [thus] the rights of all parties are preserved; none is prejudiced . . . ." *United States v. Munsingwear*, 340 U.S. 36, 39 (1950). Furthermore, "to say that the case became moot means that the defendant is entitled to a dismissal as a matter of right," *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953), but in ascertaining whether a case is moot, because the complaint was dismissed, the allegations must be taken as true. *Kossick v. United Fruit Co.*, 365 U.S. 731, 732 (1961)

(2) The court of appeals' misconstruction of the "Aggrieved Party" rule, expressed in *Deposit Guaranty Nat'l Bank*, has deprived the Petitioner of the "fundamental requirement of due process. . . [as] the opportunity to be heard 'at a meaningful time and in a meaningful manner'," *Armstrong v. Manzo*, 380 U.S. 545 (1965), quoting *Wolff v. McDonnell*, 415 U.S. 539, 557-58 (1974)[35], as a means to redress the damages that the Commissioner's failure to comply with this Court's *Holywell* opinion, and the regulations concerning liquidating trusts, has caused.

This Court has held that "[p]rocedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth Amendment," *Mathews v. Elbridge*, 424 U.S. at 333, and this case concerns the Petitioner's beneficial interest as "a statutorily created property interest protected by the Fifth Amendment," *Id.*, in contributions of self-employment taxes to the Federal Old-Age and Survivors Trust Fund, *see* 26 U.S.C. § 3101, App. 10, "from which social security benefits are paid to self-em-

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[35] *See* also, *Phillips v. Commissioner*, 283 U.S. 589, 596-597 (1931) ("Some kind of hearing is required before an individual is finally deprived of a property interest.")

ployed individuals." *Flemming v. Nestor*, 363 U.S. at 609. *See* 42 U.S.C. § 911(a)[36].

Congress has adopted the principle that the consent to be taxed is based on the principle of "fairness and equity" in the imposition and collection of taxes, and this Court has held that "[h]istorical practice is probative of whether a procedural rule can be characterized as fundamental," *Medina v. California*, 505 U.S. 437, 446 (1992), that is, fair and equitable.

The First Congress understood the meaning of due process of law[37] as "a general and indisputable rule, that where there is a legal right, there is a legal remedy, by suit or action at law, whenever that right is invaded," Tucker, *Blackstone's Commentaries*, vol. IV at 23, and "[e]very possible injury that can be offered to a man's person or property is certain of meeting with redress", *Id.* at 83,[38] *see Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 390, 397 (1971), quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)("The very essence of civil liberty certainly consists in the right of every individual to claim protection of the laws, whenever he receives an injury").

The rule is that "[n]o person shall be deprived of life, liberty, or property, (and these are the objects of all rights) without due process of law; which is the peculiar province of the judiciary to furnish him with," Tucker, *Blackstone's Commentaries*, vol. I, Appendix at 358, and "[i]t is emphatically

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[36] 42 U.S.C. § 911(a) provides that "[t]he receipts and disbursements of the Federal Old-Age and Survivors Trust Fund . . . and the taxes imposed under sections 1401 and 3101 . . . shall not be included in the totals of the budget of the United States Government."

[37] "Due process of law must . . . be had in a judicial court or a judicial magistrate," Sir Edward Coke.

[38] This Court has held that "[t]he actions of the First Congress . . . are of course persuasive evidence of what the Constitution means," *Harmelin v. Michigan*, 501 U.S. 957 (1991), citing *Marsh v. Chambers*, 463 U.S. 783, 788-790 (1983).

the province and duty of the judicial department to say what the law is", *Marbury v. Madison*, 5 U.S. at 177.

In *Mathews*, this Court adopted the following test for procedural due process claims:

> First, the private interest that will be affected by the official action; second, the risk of the erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and finally the Government's including the function involved . . . . 424 U.S. at 335.

In this case, the judgment of the court of appeals means that the underlying tax controversy concerning the tax year ended December 31, 1997 has evaded judicial review, and through the artifice of the Commissioner's concession for the entry of a decision that the proposed lien for self-employment taxes is not sustained, supra, the Commissioner has evaded answering the Petitioner's request for admissions and interrogatories, supra, notwithstanding that if there is no genuine issue as to the material facts, the Petitioner is entitled to summary judgment. *See* Rule 121, App. 12..

Deposit Guaranty Nat'l Bank, citing *Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241 (1939), held that because "[t]his Court had the question of mootness before it . . . and because petitioners alleged a stake in the outcome, the case was still live and dismissal was not required by Art. III." 445 U.S. at 335.

In this case, the court of appeals dismissed the Petitioner's appeal, based on the "Aggrieved Party" rule, despite the fact that (1) the question of whether the Petitioner's motion for summary judgment was moot was before the court; (2) the controversy presented in the petition filed in the tax court to the Commissioner's Determination, supra, remains unresolved; (3) the controversy concerning the tax consequences of this Court's *Holywell* opinion presented in the Petitioner's motion for summary judgment is "definite and concrete", *see*, *DeFunis*

v. Odegaard, 416 U.S. at 317; (4) the Petitioner has "a personal stake in the outcome of the controversy," *see*, *Baker v. Carr*, 369 U.S. at 204; and (5) the Commissioner was not entitled as a matter of law to dismissal as moot of the underlying tax controversy, *see*, *United States v. W.T. Grant*, 345 U.S. at 632. The result is that the underlying tax controversy has evaded judicial review and the Petitioner's right of due process of law has been violated. *See*, *United States v. Munsingwear*, 340 U.S. at 39.

(3) In *Electrical Fittings Corp.*, this Court defined the limits of the "Aggrieved Party" rule[39] and reversed the opinion of a court of appeals that dismissed an appeal "on the ground that the petitioners had been awarded all the relief to which they were entitled," 307 U.S. at 242. This Court held that although "a party may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree," *Id.*, because the decree "stands as an adjudication of one of the issues litigated . . . the Circuit Court had jurisdiction . . . not for the purpose of passing on the merits, but to direct the reformation of the decree," *Id.*, to address the collateral issues.

In this case, the appeal did not concern the tax court's findings of fact. The tax court did not make any findings of fact, App. 4. As previously explained, the appeal was limited to whether the tax court abused it discretion in relieving the Commissioner of the obligation to answer the Petitioner's requests for admissions and erroneously concluded the Petitioner's motion for summary judgment was moot.

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[39] *See* also, *Mathias v. WorldCom Technologies, Inc.*, 535 U.S. 682, 684 (2002), citing *New York Telephone Co. v. Maltbie*, 291 U.S. 645 (1934) ("As a general rule, a party may not appeal from a favorable judgment simply to obtain review of findings it deems erroneous.")

It is also incontrovertible that this controversy satisfies the "capable of repetition, yet evading review" exception to the mootness doctrine, because the Commissioner has failed to credit the taxes to the Petitioner's account, which the trustee was required to pay on the income attributable to the Petitioner's property, 503 U.S. at 52, for each of the tax years 1985 through 1998,[40] and although the Commissioner's criminal investigation no longer asserts that the Petitioner filed false claims against the United States for the tax year ended December 31, 1997,[41] the controversy is unresolved and has recurred in the tax years 1999, 2000, 2001, and 2002, *See* 17 *supra*. ¶19.

(b) The judgment of the court of appeals is in conflict with the pertinent part of its *HCA Health Services of Virginia* opinion, quoting *Deposit Guaranty Nat'l Bank*, that "a prevailing party may appeal an adverse ruling collateral to the judgment . . . so 'long as that party retains a stake in the appeal satisfying the requirements of Art. III'," 957 F. 2d at 123, and also the court's opinion, *Custer v. Sweeney*, 89 F. 3d 1156 (4th Cir. 1996), which held, quoting *HCA Health Services*, 957 F. 2d at 125, that although an appellant lacked standing to appeal a decision "where there was merely a 'hypothetical possibility' that the issue would again arise in a suit . . . sometime in the future'. . . [a party] forced to incur considerable expense relitigating . . . [a] claim," 89 F. 3d at 1164, has standing to appeal.

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[40] *See Commissioner v. Sunnen*, 333 U.S. at 599 ("A taxpayer may secure a judicial determination of a particular tax matter, a matter which may recur without substantial variation for some years thereafter.") The underlying tax controversy presented in the Petitioner's petition to the Tax Court concerning the Commissioner's Determination, and the Petitioner's motion for summary judgment concerning the tax consequences of this Court's *Holywell* opinion, has recurred in every year from 1985 through 2004.

[41] The Miami Center Liquidating Trust was terminated, and the trustee was discharged, on September 9, 1998.

The judgment of the court of appeals is also in conflict with *Collison v. Int'l Chemical Workers Union, Local* 217, 34 F. 3d 233 (4th Cir. 1994), which held, quoting *Cohens v. Virginia*, 19 U.S. at 404, that "[w]e have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given," and that "[c]ourts . . . have an obligation to resolve justiciable causes of action before them," 34 F. 3d at 236.

Collison is particularly interesting, with respect to the tax court's Order denying the Petitioner's motion for summary judgment as moot and the court's Order relieving the Commissioner of the obligation to answer the Petitioner's requests for admissions and interrogatories, App. 6, because the court of appeals reversed the district court's ruling that Collison's motion for summary judgment was moot and held, citing *Forest Hills Early Learning Center v. Lukhard*, 728 F. 2d 230, 245 (4th Cir. 1984), quoting Fed. R. Civ. P. 56(c) ("[t]he judgment sought shall be rendered forthwith if . . . there is no genuine issue as to any material fact . . . the moving party is entitled to a judgment as a matter of law"):

> [I]f there are no genuine issues of material fact as to the due process claim and she [Collison] is entitled to judgment as a matter of law, it would be clear error, absent some exceptional reason, not to grant summary judgment in her favor. *Id.*

(c) The judgment of the court of appeals is also in conflict with the opinions of other courts of appeal limiting the "Aggrieved Party" rule's application. For example, in *In re Reporters Committee for Freedom of the Press*, 773 F. 2d 1325 (D.C. Cir. 1984), a First Amendment case concerning two orders of a district court, the D.C Circuit Court of Appeals, citing *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368 (1979)[42], and quoting *Nebraska Press Ass'n v. Stuart*,

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[42] Gannett concerned pretrial suppression orders, in which this Court granted a writ of certiorari to the New York Court of Appeals that held the case was technically moot, but had retained jurisdiction to affirm the trial

427 U.S. 427 U.S. 539 (1976), held that although the district court's second order was unappealable since it granted the Reporters "all the relief that they requested at that point," 773 F. 2d at 1328, "[t]he 'capable of repetition' requirement is clearly met here," *Id.* at 1329, because the Reporters Committee was likely to be confronted with a future order forbidding disclosure of documents and denying a motion for summary judgment similar to the district court's first order.

The court of appeals also held, citing *Southern Pacific Terminal v. ICC*,[43] that the "evading review" requirement was satisfied, because two years is "short enough to cause action which would be mooted if not reviewed, within that time to evade review," *Id.* at 1329, and quoting *Weinstein v. Bradford*, the court concluded that the "evading review" exception applies if "there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again." *Id.*

In *W.W. Windle Co. v. Commissioner*, 550 F. 2d 43 (1st Cir. 1977), the First Circuit Court of Appeals held, in an appeal limited to the tax court's unfavorable finding of fact concerning worthless stock, for which the threshold question was "whether a taxpayer may appeal from a favorable redetermination of its tax liability," 550 F. 2d at 45, that

> Our jurisdiction . . . is conferred by 26 U.S.C. § 7482(a) which grants exclusive jurisdiction to courts of appeal to

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court's orders excluding the press and the public. This Court concluded that the controversy was not moot, 443 U.S. at 376, and citing *Nebraska Press Ass'n v. Stuart*, 437 U.S. at 546 quoting Southern Pacific Terminal, 219 U.S. at 515, held that "this Court's jurisdiction is not defeated."

[43] In *Southern Pacific Terminal Co. v. ICC*, an appeal from an order dismissing as moot a lawsuit filed to enjoin the ICC's order concerning a common carrier's preferential or unlawful conduct, this Court held that the question presented involved orders that "are usually continuing . . . and these considerations ought not to be, as they might be, defeated by short-term orders, capable of repetition, yet evading review," 219 U.S. at 515, in which the parties "have their rights determined by the Commission without a chance of redress." *Id.*

> review the decisions of the Tax Court ". . . a decision of the Tax Court being the formal determination of the existence or nonexistence of a deficiency" . . . and is reviewable only if there is a controversy between the taxpayer and the Government about the amount of the taxes due. *Id.*

In *Clapp v. Commissioner*, 875 F. 2d 1396 (9th Cir. 1989), the Ninth Circuit Court of Appeals dismissed the appeal of various Massachusetts-styled trusts, which had been treated as shams in stipulated judgments that determined no deficiencies, or penalties, were due from the trusts, because the court concluded that the trusts received all the relief which they can seek from the Tax Court, and held, citing *Handeland v. Commissioner*, 519 F. 2d 327 (9th Cir. 1975)[44] that "in the absence of issues concerning recurring liability, [the] only relief [the] Tax Court can provide is a finding of no deficiency." *Id.*

In this case, the tax court did not make a determination of no deficiency, App., 4 and the Commissioner has not credited the Petitioner's account with the taxes that the trustee was required to pay in conformity with this Court's *Holywell* opinion. The continuing controversy concerns a recurring legal issue that is unresolved, supra, and the tax court's failure to resolve the

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[44] In Handeland, the court of appeals distinguished its opinion from *Church of Scientology of Hawaii v. United States*, 485 F. 2d 313 (9th Cir. 1973), because the Commissioner conceded the Handelands were not liable for self-employment taxes on the theory that ministers of the Church of Scientology are employees and the Handelmans had "failed to demonstrate that they face a recurring tax liability." *Id.*

In Church of Scientology of Hawaii, the court of appeals affirmed the district court's order denying the government's motion to dismiss a tax refund suit, because the Commissioner's tender of refund was not intended to be a final resolution of the underlying controversy. The court held that the underlying issue was a continuing one which recurred each year and "the failure to resolve the legal issue results in adverse collateral consequences which would be resolved by a determination of the underlying issue." 485 F. 2d at 317.

legal question presented in the Petitioner's motion for summary judgment has caused adverse collateral consequences. *Supra* (CID is considering a recommendation that the Petitioner filed false claims against the United States.)

2. A writ of mandamus is the proper remedy to compel the court of appeals, and the tax court, to exercise prescribed jurisdiction, *Roche v. Evaporated Milk Ass'n*,[45] and to enforce the Tax Court Rules of Procedure, adapted from the rules that this Court formulated, *La Buy v. Howes Leather Co.*[46], for requests for admissions to determine whether there is a genuine dispute concerning material facts that would preclude summary adjudication as a matter of law of the underlying controversy concerning the tax consequences of this Court's *Holywell* opinion.

Historically, the writ of mandamus has been used to compel an officer of the government to comply with the duty imposed by law and to preserve the integrity of the courts as an institution created for the purpose of protecting the rights of the individual. *See, Blackwell's Commentaries*, vol. IV at 264-265 quoted in *Marbury v. Madison*, 5 U.S. at 168-169.

In *McClellan v. Carland*, this Court held that a writ of mandamus issues, because the federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them," 217 U.S. at 282.

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[45] In *Roche v. Evaporated Milk Ass'n*, this Court held that "[t]he traditional use of the writ in aid of appellate jurisdiction . . . in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." 319 U.S. at 26.

[46] In *La Buy v. Howes Leather*, quoting *Los Angeles Brush Corp. v. James*, 272 U.S. 701, 706 (1927), this Court held that "'[w]here the subject concerns the enforcement of the . . . [r]ules which by law it is the duty of this Court to formulate and put in force,' mandamus should issue to prevent such action thereunder so impalpably improper as to place it beyond the scope of the rule invoked." 352 U.S. at 257.

A writ of mandamus is applicable in this case, because the court of appeals sanctioned the tax court's failure to exercise its prescribed jurisdiction, *see* 26 CFR § 1.1401-1(a), App. 11, to determine whether there was a deficiency or not, and to make findings of fact, or report its opinion, in accordance with the requirements of 26 U.S.C. § 7459 (b)[47], that the underlying tax controversy concerning this Court's *Holywell* opinion presented in the petition filed in the tax court, and the Petitioner's motion for summary judgment, would not recur and the tax court's Order concerning the tax year ended December 31, 1997 would not result in the controversy evading judicial review.

A writ of mandamus is also applicable in this case to compel the tax court to require the Commissioner to answer the Petitioner's requests for admissions in accordance with Tax Court Rule 90(c), App. 11, because documentary evidence and affidavits presented with the pleading showed that after this Court's Holywell opinion was issued, the Internal Revenue Service engaged in a pattern of fraud, which has continued without abatement, and if the Commissioner's admissions were made in good faith[48], that is to say, based on his belief that his answers were in conformity with this Court's *Holywell* opinion, the regulations applicable to the Miami Center Liquidating Trust as a pass-through entity, and the tax consequences of the assignment of Holywell Corporation's property to the trustee as "the fiduciary of a trust of an individual," 503 U.S. at 54, there would have been no genuine dispute as to a material fact which would have

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[47] 26 U.S.C. § 7459(b), *Inclusion Of Findings Of Fact Or Opinions In Report*, provides that "[i]t shall be the duty of the Tax Court . . . to include in its report upon any proceeding its findings of fact or opinion or memorandum opinion. The Tax Court shall report in writing all its findings of fact, opinions, and memorandum opinions. . . ."

[48] Compare, *supra* (The material facts showing that the Commissioner ignored this Court's opinion.)

precluded summary judgment as a matter of law in the Petitioner's favor. *See* Rule 121(b), App. 12.

The pleadings concerning the applicable law showed that the Commissioner could not file an opposing written response in good faith to the Petitioner's motion for summary judgment that the Commissioner had misapplied the taxes that the trustee had paid, supra, because (1) it is a fundamental rule of tax law that a valid assignment is a taxable event; (2) the property's beneficial owner is liable for taxes due on the income attributable to the property transferred to a trust, supra n.17, quoting *Blair* and *Sunnen* (3) Holywell did not incur a tax liability attributable to the trustee's sale of the Miami Center; (4) the dividend distribution of Holywell's cash was taxable as ordinary income to the trustee as a fiduciary acting on the Petitioner's behalf, supra; and (5) the trustee was required as a fiduciary to pay taxes due on the income attributable to property, of which the Petitioner was the beneficial owner, 503 U.S. at 56.

Thus, since a liquidating trust is a pass-through entity, the Commissioner must credit the taxes, and accrued interest, that the trustee was required as a fiduciary to pay on the income attributable to the property, of which the Petitioner was the beneficial owner, to the Petitioner's account from the time the taxes were due. *See*, 503 U.S. at 58 (the taxes were due at the time the return had to be filed.)

CONCLUSION

For the foregoing reasons, this petition should be granted.

Respectfully submitted,

THEODORE B. GOULD, *Pro se*
445 Park Avenue
Suite 1401
New York, NY 10022
(917) 744-6470

July 2005

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed April 26, 2005]

No. 04-2035
02L-5670

THEODORE B. GOULD; HELEN C. GOULD
Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE
Respondent-Appellee.

On Petition for Rehearing and Rehearing En Banc

The appellants' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Luttig, Judge Duncan, and Judge Hamilton.

For the Court,

/s/ Patricia S. Connor
Clerk

APPENDIX B

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-2035

THEODORE B. GOULD; HELEN C. GOULD,
Petitioners-Appellants,

versus

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

Appeal from the United States Tax Court
(Tax Ct. No. 02L-5670)

Submitted: January 27, 2005
Decided: February 1, 2005

BEFORE LUTTIG and DUNCAN, *Circuit Judges*; HAMILTON, *Senior Circuit Judge.*

Dismissed by unpublished *per curiam* opinion.

Theodore B. Gould, Helen C. Gould, Appellants Pro Se. Bruce Raleigh Ellisen, Robert William Metzler, United States Department of Justice, Washington, D.C., for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Theodore B. Gould and Helen C. Gould appeal from the tax court's order determining that the IRS could not proceed

with its proposed collection action with respect to the Goulds' 1997 tax year liability. The Goulds argue that the tax court should have addressed their challenge to the liability determination. However, because the Goulds were not aggrieved by the tax court's order, they lack standing to appeal. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333-35 (1980); *HCA Health Servs. of Va. v. Metro. Life Ins. Co.*, 957 F.2d 120, 123 (4th Cir. 1992). Accordingly, we dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

APPENDIX C

UNITED STATES TAX COURT
WASHINGTON, DC 20217

Docket No. 5670-02L

THEODORE B. & HELEN C. GOULD,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER AND DECISION

On October 25, 2002, respondent filed a motion to stay proceedings in which respondent represented to this Court that, after petitioners had filed their petition in this case, respondent's Criminal Investigation Division had opened an administrative criminal investigation against petitioner for 1997 and other years that involved the same facts, circumstances, and transactions as those at issue in this case. After receiving petitioners' response to the motion to stay proceedings and after holding a hearing on the motion, this Court granted a stay of proceedings by order dated December 2, 2002. By order dated June 5, 2003, this Court lifted the stay of proceedings.

On June 20, 2003, petitioner's request for admissions were filed. On July 8, 2003, respondent filed a motion to extend time in which to answer admissions, a motion to extend time in which to answer interrogatories which respondent alleged had been served upon him on June 19, 2003, and a motion to dismiss the proceedings on grounds of mootness. Petitioners filed responses to each of the motions.

On August 6, 2003, respondent filed a motion for leave to withdraw motion to dismiss on grounds of mootness, which this Court granted on August 7, 2003, and a motion for entry of decision. In the motion for entry of decision, respondent stated that, "given the ongoing-criminal investigation against petitioner, * * * the need for that investigation to proceed in due course without interruption or interference from this civil matter outweighs the need to proceed with the proposed collection action" and requested this Court to enter a decision that respondent's determination as set forth in the Notice of Determination Concerning Collection Action under Section 6320 and or 6330, dated February 1, 2002, is not sustained. Pursuant to this Court's order dated August 7, 2003, petitioners submitted their opposition to respondent's motion, which was filed by this Court on August 11, 2003. In their opposition, petitioners objected to the granting of respondent's motion for entry of decision asserting that the dismissal of this case "would accomplish nothing and would leave the controversy completely unresolved." On August 14, 2003, petitioners filed a motion for summary judgment.

On June 23, 2004, this Court held a status conference in this case at which representatives of the parties, as well as petitioner Theodore B. Gould, appeared. At that status conference, respondent's counsel represented that the criminal investigation was still ongoing, that respondent was conceding that his determination allowing the proposed levy at issue in this case to proceed should not be sustained, and that respondent's motion for entry of decision should be granted. Petitioner's counsel objected, stating that this Court should decide the substantive issue raised by petitioners regarding the effect of the United States Supreme Court's opinion in *Holywell Corp. v. Smith*, 503 U.S. 47 (1992), on the underlying tax liability at issue in this case because the issue would arise in other cases and should be resolved now in the interest of judicial economy.

Upon consideration of the parties' positions, particularly respondent's concession that his determination to proceed by levy should not be sustained, this, Court is convinced that this proceeding should be resolved by granting respondent's motion for entry of decision and denying as moot petitioner's motion for summary judgment. It is hereby

ORDERED that petitioner's motion for summary judgment is denied as moot. It is further

ORDERED that respondent is relieved of any obligation to respond to petitioners' requests for admissions and interrogatories. It is further

ORDERED that respondent's motion for entry of decision is granted in that it is further

ORDERED AND DECIDED that respondent may not proceed with proposed collection action as set forth in the Notice of Determination Concerning Collection Action Under Section 6320 and/or 6330, dated February 1, 2002, for petitioners' taxable year 1997.

/s/ L. Paige Marvel
L. PAIGE MARVEL
Judge

Entered: June 25, 2004

APPENDIX D

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON D.C. 20224

May 2, 2005

Robert Musselman, Esquire
413 Seventh Street, N.E.
Charlottesville, Virginia 22902

Re: Theodore B. Gould

Dear Mr. Musselman:

This office has under consideration a recommendation that criminal proceedings be instituted against Theodore B. Gould for six counts of filing false claims against the United States, in violation of 18 U.S.C. § 287, for the years 1999, 2000, 2001, and 2002.

If you desire a conference in this matter, it will be held on May 17, 2005 at 10:30 AM in my office which is located at 5205 Leesburg Pike, Room 600, Baileys Crossroads, Virginia 22041. Please contact me no later than May 12, 2005 to confirm your attendance. If I do not hear from you by that time, I will assume you do not wish to have a conference. I can be reached at (703) 647-5441 or in writing at the aforementioned address. If you do not wish a conference at this time, you may submit in writing any defenses that you want me to consider.

Please be advised that plea bargaining, civil settlement, negotiations, and/or compromises of the tax liabilities involved will not be considered or discussed at this conference.

/s/ Charles R. Pine
Special Agent in Charge
Alexandria Field Office
Internal Revenue Service,
Criminal Investigation

APPENDIX E

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

Article III, Section 2 of The Constitution of the United States provides, in part:

> The judicial Power shall extend to all Cases, in Law And Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;-to all Cases affecting Ambassadors, other public Ministers and Consuls;-to all Cases of admiralty and maritime jurisdiction; to Controversies to which the United States shall be a Party;-to Controversies between two or more States;-between Citizens of different States, between Citizens of the same State claiming Lands under the Grants of different States.
>
> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before Mentioned, the supreme Court shall have appellate Jurisdiction, both as Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Amendment V of The Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life and limb; nor shall be compelled to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1398, *Rules Relating To Individuals' Title 11 Cases*, of the Internal Revenue Code (Title 26) provides, in part:

(f) TREATMENT OF TRANSFERS BETWEEN DEBTOR AND ESTATE

(1) TRANSFER TO ESTATE NOT TREATED AS DISPOSITION. A transfer (other than by sale or exchange) of an asset from the debtor to the estate shall not be treated as a disposition for purposes of any provision of this title assigning tax consequences to a disposition, and the estate shall be treated as the debtor would be treated with respect to such asset,

(2) TRANSFER FROM ESTATE TO DEBTOR NOT TREATED AS DISPOSITION. In the case of a termination of the estate, a transfer (other than by sale or exchange) of an asset from the estate to the debtor shall not be treated as a disposition for purposes of any provision of this title assigning tax consequences to a disposition, and the debtor shall be treated as the estate would be treated with respect to such asset.

(g) ESTATE SUCCEEDS TO TAX ATTRIBUTES OF DEBTOR. The estate shall succeed to and take into account the following items (determined as of the first day of the debtor's taxable year in which the case commences) of the debtor—

(1) NET OPERATING LOSS CARRYOVERS. The net operating loss carryovers determined under section 172.

(2) CHARITABLE CONTRIBUTIONS CARRYOVERS. The carryover of excess charitable contributions determined under section 170(d)(1).

(3) RECOVERY OF TAX BENEFIT ITEMS. Any amount to which section 111 (relating to recovery of tax benefit items) applies.

(4) CREDIT CARRYOVERS, ETC. The carryovers of any credit, and all other items which, but for the commencement of the case, would be required to be taken into account by the debtor with respect to any credit.

(5) CAPITAL LOSS CARRYOVERS. The capital loss carryover determined under section 1212.

(6) BASIS, HOLDING PERIOD, AND CHARACTER OF ASSETS. In the case of any assets acquired (other than by sale or exchange) by the estate from the debtor, the basis, holding period, and character it had in the hands of the debtor.

. . . . .

(i) DEBTOR SUCCEEDS TO TAX ATTRIBUTES OF ESTATE. In the case of a termination of an estate, the debtor shall succeed to and take into account the items referred to in paragraphs (1), (2), (3), (4), (5), and (6) of subsection (g) in a manner similar to that provided in such paragraphs (but taking into account that the transfer is from the estate to the debtor instead of from the debtor to the estate). . . .

Section 1402, *Definitions*, of the Internal Revenue Code (Title 26) provides, in part:

> (a) NET EARNINGS FROM SELF-EMPLOYMENT.—The term "net earnings from self-employment" means the gross income derived by an individual from any trade or business carried on by such individual, less the deductions allowed by this subtitle which are attributable to such trade or business, plus his distributive share (whether or not distributed) of income or loss described in section 702(a)(8) from any trade or business carried on by a partnership of which he is a member . . . .

Section 3101, *Rate of Tax*, of the Internal Revenue

Code (Title 26), provides in part:

(a) *Old-age survivors, and disability insurance.*—

In addition to other taxes, there is hereby imposed on the income of every individual a tax . . . .

(b) *Hospital insurance.*—In addition to the tax imposed by the preceding subsection, there is imposed on the income of every individual a tax . . . .

Section 1.1401-1, *Tax On Self-Employment Income*, of the Treasury Regulations provides, in part:

> (a) There is imposed, in addition to other taxes a tax upon the self-employment income of every individual at the rates prescribed in section 1401(a) (old-age, survivors, and disability insurance) and (b) (hospital insurance). This tax should be levied, assessed, and collected as part of the income tax imposed by subtitle A of the Code and, except as otherwise expressly provided, will be included with the tax imposed by section 1 or 3 in computing any deficiency or overpayment and in computing the interest and additions to any deficiency, overpayment, or tax. Since the tax on self-employment income is part of the income tax, it is subject to the jurisdiction of the Tax Court of the United States to the same extent and in the same manner as the other taxes under subtitle A of the Code. . . .

Rules of Tax Court Procedures:

Section (c), *Response to Request*, of Rule 90, Requests For Admission, of the tax court's Rules of Procedure, provides:

> Each matter is deemed admitted unless, within 30 days after service of the request or within such shorter or longer time as the Court may allow, the party to whom the request is directed serves upon the requesting party (1) a written answer specifically admitting or denying the matter involved in whole or in part, or asserting that

> it cannot be truthfully admitted or denied and setting forth in detail the reasons why this is so, or (2) an objection, stating in detail the reasons therefore . . . . A denial shall fairly meet the substance of the requested admission, and, when good faith requires that a party qualify an answer or deny only a part of a matter, such party shall specify so much of it as is true and deny or qualify the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless such party states that such party has made reasonable inquiry and that the information known or readily obtainable by such party is insufficient to enable such party to admit or deny . . . .

Section (b), *Motion and Proceedings Thereon*, of Rule 121, Summary Judgment, of the tax court's rules of procedure, provides:

> The motion shall be filed and served in accordance with the requirements otherwise applicable . . . . An opposing written response, with or without supporting affidavits, shall be filed within such period as the Court may direct. A decision shall thereafter be rendered if the pleadings, answers to interrogatories, depositions, admissions, and any other acceptable materials, together with the affidavits, if any, show that there is no genuine dispute as to any material fact and that a decision may be rendered as a matter of law.